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Supreme Court, U.S.
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No. 97-1246

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY,

Petitioners,

v.

CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT A CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC.

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the district court's dismissal of petitioners' Second Amended Complaint for failure to state a claim under Section 1 of the Sherman Act, where petitioners (collectively "Cassan") admittedly did not agree to or actually purchase a second product from respondents (collectively "Dollar") and, therefore, could not allege the existence of a contract, combination or conspiracy in restraint of trade.

2. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the district court's dismissal of petitioners' Second Amended Complaint on grounds that petitioners alleged standing under Section 4 of the Clayton Act, but failed to allege injury to competition as required to maintain a claim under Section 1 of the Sherman Act.

PARTIES TO THE PROCEEDINGS

Respondent Chrysler Corporation states that it has no parent company, subsidiary, or affiliate that has issued shares to the public. Effective December 23, 1997, Chrysler made an initial public offering of its rental car subsidiaries, and retained no ownership interest in that business. Respondents Dollar Systems, Inc., and Dollar Rent-A-Car Systems, Inc., have merged and are currently known as Dollar Rent A Car Systems, Inc. Dollar is a wholly-owned subsidiary of Dollar Thrifty Automotive Group, Inc., which is a publicly traded company.

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I. STATEMENT OF THE CASE

This case involves a dispute between Cassan, a rental car franchisee and Dollar, the franchisor. Cassan and Dollar entered into two franchise agreements over 20 years ago. App.6-7 ¶¶ 1, 3. Under these agreements, Cassan, as franchisee, and Dollar, as its franchisor, agreed to certain restrictions in the conduct of Cassan's franchises. One such restriction was that Dollar could approve or disapprove the use of its trademarks and logos in advertisements. *See* App. 39, ¶ 3. In 1990, Chrysler Corporation, through its subsidiary Pentastar, purchased Dollar. After the purchase, Dollar instituted a change in policy in which Chrysler automobiles would be the featured car of the Dollar fleet. Pursuant to this policy, with a few exceptions during a transitional period, franchisees were not permitted to use the Dollar logo to advertise non-Chrysler vehicles. However, franchisees were free to purchase, lease and sell non-Chrysler cars, and they could also advertise these cars so long as they did not use the Dollar logo.

After the change in trademark policy, Dollar discovered that General Motors Corporation ("GM") was negotiating with certain Dollar franchisees for the advertising of GM cars with Dollar's trademarks and logos. *See generally* App. 38-40. In settlement of this litigation with GM in March 1991, Pentastar, on behalf of Dollar and itself, entered into a Release and Settlement Agreement with GM. *Id.* Paragraph 3 of that agreement states that in recognition of pre-existing license agreement provisions and corporate policies giving Pentastar and its subsidiaries the right to stipulate their franchisees' manner of advertising, to approve or disapprove any advertising using the subsidiaries' name, trademarks or logos, and to limit franchisees from advertising non-Chrysler cars, GM "agrees not to seek an advertising agreement with persons or entities who have license or

franchise agreements with Pentastar subsidiaries," except with specified exceptions listed in the agreement. App. 39, ¶ 3. Dollar did not grant Cassan an exception to this agreement. *Id.*

Originally, Cassan sued Dollar making various state law claims and obtained a jury verdict for damages in *Cassan Enterprises, Inc. v. Dollar Systems, Inc.*, Case No. C93-1077R ("*Cassan I*"). That case was reversed by the United States Court of Appeals for the Ninth Circuit on virtually all grounds. The decision is not at issue in this Petition. While *Cassan I* was pending in the district court, the instant suit ("*Cassan II*") was filed with identical factual allegations, but asserting that the same facts violated the antitrust laws as a tying violation. The gist of Cassan's allegations was that Dollar tied the Dollar trademark to the purchase of Chrysler automobiles. However, Cassan also alleged that it chose to purchase GM cars and determined that it could do so at a lower price than Chrysler cars. App.15, ¶ 39; App. 31, ¶ 93. Accordingly, it never entered into the allegedly unlawful tying agreement.

The District Court for the Western District of Washington dismissed *Cassan II* under Fed. R. Civ. P. 12, for failure to state a claim -- three times. The Second Amended Complaint, Cassan's third and last try, was dismissed with prejudice. The Ninth Circuit affirmed the dismissal in an unpublished memorandum opinion, holding that Cassan failed to allege a contract, combination or conspiracy in restraint of trade, injury to competition to establish an antitrust violation under a rule-of-reason theory, and market power to assert a *per se* antitrust violation. Cassan petitions this Court to review only the first two issues.

There is no reason to grant the petition because the Ninth Circuit was unquestionably correct in affirming the dismissal of the Second Amended Complaint. Cassan failed to allege a contract, combination or conspiracy, a prerequisite

for a Sherman Act violation. To the contrary, it alleged that it resisted, and did not agree to, the claimed tying arrangement; therefore, no tie occurred. Indeed, even in the questions presented to this Court Cassan admits that it was "not actually forced to purchase the tied product." Contrary to Cassan's petition, there is no conflict between the lower courts on this issue: there must be some contract, combination or conspiracy in restraint of trade to establish a Sherman Act violation. Since Cassan could not allege any agreement, the Ninth Circuit properly affirmed dismissal of its claims.

Furthermore, neither the district court nor the Ninth Circuit applied an impermissible "heightened" pleading requirement to the case. Taken as a whole, Cassan's complaint alleges injury only to itself, not to competition. Since Cassan cannot allege this essential element of a Sherman Act claim, the Ninth Circuit properly affirmed the dismissal of its Second Amended Complaint.

II. REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Properly Held That Cassan's Second Amended Complaint Failed To Allege A Contract, Combination Or Conspiracy In Restraint Of Trade.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The elements of a Section 1 violation are: (a) an agreement or conspiracy; (b) resulting in an unreasonable restraint on trade; (c) that affects competition. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 632-33 (9th Cir. 1987); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986). The

Ninth Circuit correctly held that Cassan failed to allege an actionable agreement or conspiracy.

1. There Is No Conflict Between The Circuit Courts; *Ware* is Inapplicable.

Cassan asserts that the Ninth Circuit's decision conflicts with an 18-year-old decision of the United States Court of Appeals for the Sixth Circuit in *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980). The conflict is contrived since *Ware*, however, is inapplicable.

In *Ware*, the defendant mobile home park, required prospective tenants to purchase mobile homes as a condition of leasing space in the park. *Ware* addressed whether plaintiff had standing under § 4 of the Clayton Act to claim "injury in his business or property." The issue of standing to assert antitrust damages addressed by *Ware* is confused by petitioners with the Sherman Act § 1 requirements of an injury to competition and concert of action. Both of these requirements were bases for dismissal of Cassan's Second Amended Complaint, and neither is addressed in the *Ware* decision. The Sixth Circuit found that Ware satisfied the standing requirements by alleging that he had been economically injured by respondent's conduct. But the court did not address whether Ware had established the essential elements of a Section 1 claim. Since the contract, combination or conspiracy element was apparently not raised by the parties and certainly not addressed in the opinion, it is overreaching to cite *Ware* as holding that an agreement is not required.[1]

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[1] To the extent one could read *Ware* as holding that a Sherman Act tying violation may be maintained without an agreement or, in essence, for an attempted tie-in, the opinion is simply wrong and contrary to all decided cases addressing the issue.

2. Cassan Failed To Allege A Contract, Combination Or Conspiracy Between Cassan And Dollar.

There are several reasons why the tie or bundled sale Cassan alleges would not violate the Sherman Act, but the most important reason relied upon by the district court and the Ninth Circuit is that petitioner asserts that it did not take the tied purchase.[2] Throughout its Second Amended Complaint, Cassan alleged that it *resisted* Dollar's claimed efforts to tie the purchase of Chrysler cars to the Dollar logo and it was *not* required to purchase Chrysler automobiles. App. 15, ¶¶ 38-39; App. 9, ¶ 13 (alleging that Dollar engaged in "a deliberate attempt to destroy or cripple plaintiffs as competitors in the rent-a-car industry in Seattle and Portland *after they resisted defendants [Dollar's] unlawful tie-in agreements*") (emphasis added); App. 10, ¶ 20 ("*When plaintiffs [Cassan] resisted Chrysler's unlawful demands*, Chrysler instituted a series of retaliatory actions . . . .") (emphasis added). Indeed, in its petition, Cassan reiterates that it "[was] not actually forced to purchase the tied product." Petition at i ("Questions Presented"). In short, Cassan averred that it was never required to purchase the tied product and that it refused to accept Dollar's alleged tie-in.

Resistance to allegedly unlawful trade practices does not create a contract, combination or conspiracy under Section 1 of the Sherman Act. *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523-24 (8th Cir. 1987); *Shop & Save Food Markets v. Pneumo Corp.*, 683 F.2d 27, 30-31 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *See also Unijax, Inc. v. Champion Int'l. Inc.*, 683 F.2d 678, 685 (2d

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[2] At one point, Cassan alleged the existence of an agreement in restraint of trade between Chrysler and General Motors. Cassan appears to have abandoned this theory and does not raise it in its petition.

Cir. 1982); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs. Inc.*, 637 F.2d 1376, 1388 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Amplex of Md., Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 116 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 915-16 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *O.S.C. Sales Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1294 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); *cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

As the Ninth Circuit correctly held, in this case, there is simply no forced purchase. Cassan was free to purchase automobiles from Chrysler, GM or any other manufacturer it chose. Indeed, Cassan alleged that it had freely exercised that choice by purchasing GM cars. Without a coerced agreement, Cassan cannot establish a Section 1 violation and the Ninth Circuit properly affirmed dismissal of the Second Amended Complaint.

B. The Ninth Circuit Held That Cassan's Second Amended Complaint Failed To Allege Actual Harm To Competition.

Injury to competition is an essential element of a Section 1 claim under either a *per se* or rule of reason analysis. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988). *See Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1977). The Ninth Circuit correctly held that Cassan failed adequately to allege an injury to competition.

1. The Ninth Circuit's Decision Does Not Conflict With *Kodak*.

Citing to this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), Cassan contends that all antitrust claims must be resolved on

a "fully developed evidentiary record" and cannot be dismissed under Fed. R. Civ. P. 12(b)(6). Petition at 15-16. *Kodak* says nothing of the sort. Nothing in that decision suggests that there is a special exception to Fed. R. Civ. P. 12(b)(6) for antitrust claims, nor has Rule 12(b)(6) been amended to exempt antitrust cases.

2. The Ninth Circuit Did Not Apply A "Heightened" Pleading Requirement.

Cassan also claims that the Ninth Circuit applied a "heightened" pleading requirement by rejecting Cassan's conclusory allegations of injury to competition. When Cassan's pleading is viewed as a whole, it is clear that all of Cassan's claims arise from a dispute that solely involves Cassan and Dollar and that Cassan is asserting only injury to itself, not to competition. Thus, as the Ninth Circuit recognized, with the exception of a general assertion of injury to competition, Cassan actually complains of injury only to itself.[3] Petitioners cannot save their complaint by baldly stating that competition is injured where there is no theory or facts asserted by which competition can be injured. *See, e.g., Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) ("In order successfully to allege injury to competition, a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. Rather, a claimant must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail").

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[3] For example, in paragraph 95, Cassan alleges that the specific intent of Dollar's alleged offenses was to injure *petitioners* and to destroy their business. App. 32 ¶ 95. Paragraphs 96 and 98 further alleges injury only to Cassan. App. 32-33, ¶ 96, 98; *See also* App. 19, ¶ 49; App., App. 20, ¶¶ 53-54; App. 27-29, ¶ 83.

The Ninth Circuit's holding is entirely consistent with this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). In that case, the Court granted certiorari to resolve a conflict among the Courts of Appeals on whether a "heightened" pleading standard applied in § 1983 actions alleging municipal liability. The Court held that the Fifth Circuit incorrectly required plaintiffs in such actions to state with "factual detail" and "particularity" the bases for their claims, including facts alleging why the defendants cannot maintain the defense of immunity. *Leatherman*, 507 U.S. at 167-68. Here, however, the Ninth Circuit announced no such "heightened" pleading requirement. Instead, it correctly ignored Cassan's conclusory statements of competitive injury where the body of the complaint belied them.

Moreover, unlike *Leatherman*, there is no conflict between lower courts on this issue. As petitioners acknowledge, Petition at 18 n. 9, numerous lower courts agree with the Ninth Circuit's application of Fed. R. Civ. P. 12(b)(6). *E.g., Crane & Shovel Sales Corp.*, 854 F.2d 802, 805 (6th Cir. 1988); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975); *Stewart v. Hevelone*, 283 F. Supp. 842, 844 (D. Neb. 1968).

Jackson v. Marion County, 66 F.3d 151 (7th Cir. 1995), cited by petitioners, also supports the Ninth Circuit's decision in this case. While stating that the Federal Rules do not require "fact" pleading, the court acknowledged that the factual allegations the plaintiff does set forth can lead to dismissal under Fed. R. Civ. P. 12(b)(6):

> [T]here is no inconsistency between *Leatherman* and our repeated insistence . . . that a plaintiff can plead

> himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.
>
> * * *
>
> We have expressed our puzzlement that lawyers insist on risking dismissal by filing prolix complaints . . . But nothing in the federal rules forbids the filing of prolix complaints. If plaintiffs' lawyers want to live dangerously -- or want to find out sooner rather than later whether they have a claim -- they can.

66 F.3d at 153-54.

Cassan chose to live dangerously and file a detailed complaint that conclusively demonstrates that it has no claim. The Ninth Circuit correctly recognized that a review of all the facts pleaded showed there was no competitive injury notwithstanding a few conclusory allegations to the contrary.[4]

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[4] Moreover, Cassan's antitrust claims are barred by the doctrine of claim preclusion, or res judicata. In *Cassan I*, Cassan's factual assertions were virtually identical to those alleged in its complaint in this action. Specifically, Cassan alleged that: (a) Dollar required Cassan to purchase Chrysler automobiles; (b) Pentastar and GM entered into an agreement that precluded Cassan from advertising GM cars; (c) Dollar unfairly caused affiliated companies to compete with Cassan; and (d) Dollar failed to support Cassan's bid for a concession at the airport in Seattle-Tacoma, Washington. Plaintiffs in *Cassan I* and this action are identical. With the exception of Chrysler Corporation, the parent company of the Dollar and Pentastar defendants, the same defendants are named in both actions. Finally, *Cassan I* resulted in

III. CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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a final judgment on the merits. Although the Ninth Circuit did not reach this issue, all elements of claim preclusion are met. *See Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). For this additional reason, the Court should deny the writ.